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JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. 550

BERNARD J. McKENNA,
Petitioner,

v.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF CLAIMS

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Supreme Court of the United States

OCTOBER TERM, 1956

No. .....

BERNARD J. McKENNA,

Petitioner,

v.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI

Bernard J. McKenna, in his own behalf, prays a writ of certiorari issue to United States Court of Claims to review its judgment for your petitioner, at No. 305 of 1954, awarding $734.52 out of a claim for salary of $2,790.98.

Reason.

Government employees are warned by this decision that the laws enacted for their benefit are surplus and if the Veterans Administration says a worker WOULD HAVE BEEN demoted it has the same consequence as a procedurally correct reduction. The Court of Claims approves this fiat. This Court can settle the issue.

Opinion.

The opinion of the Court of Claims can not be found in any reports. It is appended to this petition.

Jurisdiction.

The judgment is dated and was entered May 1, 1956. On July 12, 1956 petitioner's motion for a new trial was overruled. On October 8, 1956 this Court extended to November 10, 1956 the time to file this petition. Jurisdiction to review this case is given by 28 USCA 1255(1). The Court of Claims had jurisdiction under 28 USCA 1491 (1) (2) (3).

Question for Review.

May the Government ignore an employee it now admits was illegally reduced in rank and compensation, keep him in a lower grade, in ignorance of its conduct, until it dismisses him from service and pocket the salary he was entitled to by law?

Statute and Regulation.

Veterans Preference Act of 1944, 58 Stat. 387 etc., section 12 (5 USCA 861) and section 14 (5 USCA 863); also section 20.10 Civil Service Regulation on section 12 are appended.

Statement of Facts.

1. On July 24, 1949 defendant below reduced petitioner from grade GS-12 to GS-9 but kept a man with a DISCHARGE FROM DRAFT WW I, as a veteran, in the same job.
2. No notice of any kind, no information or explanation about his own status or that of any other employee was given petitioner after July 24, 1949 and he worked as a GS-9 until dismissed on October 10, 1951.
3. On April 10, 1950 defendant, unknown to petitioner, reduced two GS-12 employees, and furloughed the non veteran, according to photostats of its records.

4. After this action was brought for the GS-12 salary defendant admitted the reduction of July 24, 1949 was illegal and offered $734.52 to April 10, 1950, but denied liability thereafter because petitioner WOULD HAVE BEEN reduced that date.

ARGUMENT.

Defendant's case is laid out on page 6 of its brief below.

What the Court did in *Brennan v. United States*, 123 C. Cls. 327 and *O'Brien v. United States*, 129 C. Cls. 752 is not mentioned as law.

But three little words—WOULD HAVE BEEN—picked out of dictum in each case seem to be pregnant with meaning for April 10, 1950.

Brennan was an unclassified non veteran in a war service job. The Court found his reduction in force procedure was complete with no arbitrary action and dismissed his suit for salary. The dictum are the gratuitous words about a *replacement order*: There was no replacement order in his case.

O'Brien had two months and ten days work in a soldier's place before he was drafted. March 15, 1946 the last of four permanent employees returned to his job. All were *As*. O'Brien, a temporary, was a *B*. He sued under the Selective Service Act of 1940 because he was not restored to his temporary position. Nine years after his discharge the Court made him a present of a judgment. *Fishgold v. Sullivan*, 328 US 275 does not mention the Veterans Act but the Court of Claims said it does. The Selective Service Act says, and the courts have repeated, that O'Brien as a temporary worker had no reemployment rights under any circumstances: *Salzman v. London Coat*, 156 F. 2d.

538. The O'Brien dictum: There was no point about "rating" or "veterans preference" in the case. The Selective Service Act restored employees as they returned and timely applied.

GS-12 and GS-9 employees are not on competing levels and the reduction of GS-12s on April 10, 1950 had no effect on petitioner, regardless what their rating was. Ratings matter when an employee is proceeded against under the law and petitioner was not.

"Each (employee) must stand on his own record."
Longfellow v. Gudger, 16 F. 2d. at 656.

Elder v. Brannan, 341 U. S. 277 says in effect the same thing. It did not do Mr. Elder, a veteran with temporary status, any help, after he was properly dismissed, that men dismissed with him were rehired although they were not veterans and had less credit than he had, when his record had no request for reemployment.

The April 10, 1950 disregard of petitioner by the VA was a persistent and continuing extension of its action on July 24, 1949. Good faith, common decency, as well as the law dictated that he be called in that date, the wrong admitted, his right to GS-12 status recognized and then and there be paid the $734.52 deducted salary.

What is called FINDINGS OF FACT (R. ps. 27 & 28) is merely a verbatim copy of the STIPULATION. The opinion uses words from No. 6, about higher ratings, but passes over No. 7 showing the fraudulent conduct of the VA in concealing its relations with McDougall, in hiding the doctored retention register, and dismissing petitioner without notice about any reduction on April 10, 1950. The Court shirked its duty to find the ultimate, controlling facts for the application of the law, and summarized its

attitude in THE POSITION TAKEN BY DEFENDANT. This position was that adopted by the Court, a friendly co-existence in thinking that did violence to the theoretical "man to man" standing supposed to prevail in the lower court.

U. S. v. Esnault-Pelterie, 299 U. S. 201;
U. S. v. Causby, 328 U. S. 258.

A government employee, veteran or not, has legal protection.

The Civil Service Commission cannot secretly mark its records extending a non veteran's probationary period,
Borak v. Biddle, 141 F. 2d. 278.

An Executive Order cannot shortcircuit the requirements of the Lloyd-LaFolette Act for a non veteran (5 USCA 652) that "no person in the classified civil service of the United States shall be removed * * * therefrom without notice and reasons in writing."
Roth v. Brownell, 215 F. 2d. 500.

And a veteran is entitled to section 14 of the Veterans Act if the Civil Service Commission, under its own procedure, prosecutes him under the Hatch Act.
Flanagan v. Young, 228 F. 2d. 466.

McDougall v. Civil Service Commission, 202 F. 2d. 361 (certiorari denied June 1, 1953 in this Court at No. 697 October Term, 1952) is the old law followed by the VA and its Administrator's Decisions back to 1931 and before that by the Veterans Bureau, according to the government brief in opposition to the writ. The case began as No. 5401 of 1950, Civil Action, in the District Court where it is disclosed that McDougall, after twenty years in government service, was made a veteran by the VA on June 11, 1947.

Stringer v. United States, 117 C. Cls. 30 (cited in *Flanagan v. Young,* above) at page 49 piously says of the Veterans laws:

> "These are not little matters. They are the concern of the great army of veterans who at least are entitled to a good faith compliance with the rights granted by a grateful people through Congress. WE CANNOT SET THE PATTERN OF TRIMMING AWAY THESE RIGHTS."

Crocker v. United States, 130 C. Cls. 567 at page 572 dubs an Administrator's action as "A Verdict Before Trial". A good name for a WOULD HAVE BEEN demotion.

The record on page 7 shows a motion to strike. This was to have stricken the WOULD HAVE BEEN limitation on the basis of estoppel due to the VA conduct. No argument could be arranged.

Petitioner has a fundamental property right to the GS-12 salary from July 24, 1949 to October 10, 1951 and the court below in condoning the bad faith and arbitrary conduct of the defendant's agency has denied him the due process of the Fifth Amendment.

Petitioner feels it is his duty to government employees to invest part of his award to call the attention of this Court to the decision of the Court of Claims so that its power of supervision may be exercised if it believes it is called for.

B. J. McKENNA, *pro se.*

Appendix.

OPINION.

Per Curiam: Plaintiff, a veteran's preference eligible, alleges that on July 24, 1949, he was improperly demoted from the position of Rating Specialist (Legal), P-5, to the position of Registration Officer, CAF-9, Regional Office, Veterans Administration.

He sues for the difference in salary between the two positions from July 24, 1949, through October 10, 1951, when he was finally properly separated from the service.

The facts have been stipulated by the parties.

The reduction of July 24, 1949, was in lieu of separation due to a reduction in force. At the time of that reduction the retention register for Rating Specialist (Legal) P-5, included the name of one employee, William C. McDougall, who was shown by the register to have higher retention credits than plaintiff, and who was also shown by the register to have been entitled to a veteran's preference.

In the reduction in force the plaintiff instead of McDougall was demoted, and McDougall was retained in the P-5 position.

After the demotion of plaintiff was made effective it was determined that the retained employee, McDougall, was not entitled to veteran's preference under the Veterans Preference Act of 1944, 58 Stat. 387. The veteran's preference status of McDougall was withdrawn and on April 7, 1950, he was furloughed due to a second reduction in force, effective August 1, 1950, his last day of duty being April 15, 1950.

McDougall contested the removal of his veteran's preference status. The issue was finally resolved by the Su-

preme Court when, on June 1, 1953, it denied certiorari in the case of *McDougall v. United States Civil Service Commission*, 202 F. 2d 361, in which case the court decided that McDougall was not entitled to a veteran's preference status.

In the meantime, effective April 10, 1950, two employees, Henry E. Robinson, Jr., and Harold K. Leitch, due to a second reduction in force, were demoted from Rating Specialist (Legal) GS-12, to positions of Adjudicator, GS-9. Both these employees had higher retention credits in the Rating Specialist (Legal) GS-12 competitive level than plaintiff would have had, had he rather than McDougall, been retained in the position of Rating Specialist (Legal) P-5 (GS-12) at the time of the first demotion.

The defendant concedes that it made a mistake in demoting plaintiff rather than McDougall on July 24, 1949, in the first reduction in force.

The issue is whether plaintiff is entitled, as he claims, to the difference in salary attached to the two positions from July 24, 1949, through October 10, 1951, at which time he was properly separated from the service; or, as defendant claims, he is entitled to recover that difference only to the time of a second reduction in force, April 10, 1950, when two men with higher retention credits in the Rating Specialist (Legal) GS-12 competitive level were demoted.

The parties have stipulated that if recovery is had for the first period the amount would be $2,790.98, and that if limited to the date of April 10, 1950, the amount is $734.52.

This issue was before the Court in *Brennan v. United States*, 123 C. Cls. 326, cert. den., 344 U. S. 935, and *O'Brien v. United States*, 129 C. Cls. 752, both of which decisions support the positions taken by the defendant.

The plaintiff is entitled to recover the sum of $734.52.

It is so ordered.

(Findings of Fact Record Ps. 27 & 28.)

Civil Service Regulations. 14 Federal Register, page 3610 (Dated June 29, 1949—Effective September 1, 1949).

Sec. 20.10 Notice to employees.

(a) "Proposed action. Each employed affected by a reduction in force shall be given a notice in writing, stating specifically the action proposed to be taken in his case, in advance of the effective date of the action."

(b) "The notice shall be given at least thirty days in advance of involuntary termination of active duty wherever possible, at least thirty day in advance of any reduction in rank or compensation, at least thirty days in advance of a reassignment to a different commuting area. The notice shall be given at least thirty days in advance of involuntary separation from the rolls in all cases.

Veterans Preference Act of 1944—58 Stat. 390.

Sec. 12.

"In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings • • •"

Sec. 14.

"No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or barred

for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days advance written notice * * * stating any and all reasons, specifically and in detail, for proposed action * * *"

(The balance of the section covers the procedure after the notice is given.)

No. 550

NOV 5 1956
JOHN T. FEY, Clerk

In the United States Court of Claims

No. 305-54

BERNARD J. MCKENNA, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

DEFENDANT'S BRIEF

(Filed December 21, 1955)

STATEMENT OF THE CASE

Plaintiff seeks to recover the difference between the salary of the position of Rating Specialist (Legal), P-5, and the salary of the position of Registration Officer, CAF-9, for the period it is alleged that he was improperly demoted from the P-5 position to the CAF-9 position, in lieu of separation due to reduction in force.

QUESTION PRESENTED

Is plaintiff entitled to recover back salary for the period he would have properly occupied, a grade CAF-9 position, regardless of a prior improper demotion due to reduction in force?

FACTS

All of the material facts in this case have been stipulated.

Plaintiff is a citizen of the United States and a preference eligible within the meaning of the Veterans' Preference Act of 1944, as amended.

Prior to July 24, 1949, plaintiff was employed by the Regional Office, Veterans Administration, Pittsburgh, Pennsylvania, in the position of Rating Specialist (Legal), P-5, $6,235.20 per annum. On July 24, 1949, plaintiff was reduced to the position of Registration Officer, CAF-9, $5,232.00 per annum, in lieu of separation due to reduction in force. The retention register for Rating Specialist (Legal) P-5, in force and effect at the time of plaintiff's demotion, included the name of an employee, William C. McDougall, who was shown as having higher retention credits than plaintiff by reason of his having been given veteran preference in the compilation of the register. After plaintiff's demotion was effected, the Veterans Administration discovered that William C. McDougall was not entitled to veteran preference under Civil Service Regulations then in effect (Federal Personnel Manual VI-10, July 7, 1947), which did not recognize a Certificate of Discharge from the Draft in World War I for veteran preference purposes. Upon discovery of the error, the veteran preference of William C. McDougall was withdrawn and he was furloughed due to reduction in force, effective August 1, 1950. William C. McDougall contested his right to veteran preference and the issue was not finally resolved until the Supreme Court of the United States, 345 U.S. 969, on June 1, 1953, denied certiorari in the case of *McDougall* v. *United States Civil Service Commission*, 202 F. 2d 361 (1953), in which the United States Court of Appeals for the District of Columbia Circuit held that a Certificate of Discharge from the Draft in World War I did not give entitlement to veteran preference.

In April, 1950 there was another reduction in force effected in the competitive level of Rating Specialist (Legal) GS-12 (formerly P-5) at the same Regional Office. As the result of this second reduction in force of Rating Specialists (Legal), two such employees, Henry E. Robinson, Jr. and Harold K. Leitch, were demoted in lieu of separation to positions of Adjudicator CAF-9, effective April 10, 1950. Both of these employees had higher retention credits in the competitive level of Rating Specialist (Legal), GS-12, than plaintiff would have had if he had been retained in said competitive level instead of being demoted to a CAF-9 position due to reduction in force on July 24, 1949.

Following the withdrawal of the veteran preference status of William C. McDougall by the Veterans Administration, no effort was made to adjust any personnel actions that were affected by the erroneous granting of veteran preference status to that employee.

Plaintiff was properly separated from his CAF-9 position with the Veterans Administration, due to reduction in force, effective the close of business October 10, 1951.

ARGUMENT

Under the Civil Service Regulations in force and effect at the time, a Certificate of Discharge from Draft during World War I did not entitle an employee to veteran preference. Under prior Civil Service Regulations, an employee holding a Certificate of Discharge from Draft during World War I was given veteran preference. The granting of preference under such circumstances was based mainly upon the decision of the United States Court of Appeals for the District of Columbia in *Hurley* v. *Crawley*, 50 F. 2d 1010 (1931),

holding that the holder of a Certificate of Discharge from Draft during World War I was entitled to the benefit of the preferential status provided by Civil Service Rule VI granting preference in appointment, *inter alia*, to honorably discharged soldiers, sailors and marines.

Subsequent to the decision in *Hurley* v. *Crawley, supra*, the United States Supreme Court held in *Patterson* v. *Lamb*, 329 U.S. 539 (1947), that the holder of a Certificate of Discharge from Draft during World War I was not entitled to a certificate of honorable discharge from the Army. Following this decision, the Civil Service Commission changed the applicable regulations, effective July 7, 1947, and required the withdrawal of any preference already allowed on the basis of a Certificate of Discharge from Draft during World War I (Transmittal Sheet 107, July 7, 1947).

Under the foregoing circumstances, it was erroneous to have given veteran preference to William C. McDougall in the reduction in force of Rating Specialist (Legal), GS-12 (P-5), effected by the Veterans Administration in July, 1949.

Plaintiff claims that he is entitled to recover for the full period July 24, 1949, the effective date of his demotion, to and including October 10, 1951, the effective date of his proper separation from service due to reduction in force. It is the position of defendant that plaintiff suffered no damage resulting from his improper demotion subsequent to April 9, 1950 and that he is, therefore, not entitled to recover for any period subsequent to that date.

The retention register for Rating Specialist (Legal) GS-12 (P-5) dated March 9, 1950, in full force and effect on April 9, 1950, is attached to the stipulation of

facts and documents filed herein on October 17, 1955, and is marked Exhibit 2. An examination of this retention register shows that on April 9, 1950, there were two employees in the Rating Specialist (Legal) GS-12 (P-5) competitive level with higher retention credits than plaintiff who were demoted to GS-9 positions, effective April 10, 1950. It is obvious, therefore, that, if plaintiff had previously been retained in the said GS-12 (P-5) competitive level instead of being demoted to a CAF-9 position on July 24, 1949, he nevertheless would have been demoted to a CAF-9 position, effective April 10, 1950. Subsequent to April 10, 1950, he therefore suffered no loss of salary as the result of his prior improper demotion.

It is inconceivable that this Court would allow plaintiff to recover the difference between the salary of the GS-12 and the CAF-9 positions for the entire time plaintiff was on the rolls of the Veterans Administration, under the stipulated facts in this case. During the period July 24, 1949 to October 10, 1951, plaintiff performed only the duties of the CAF-9 position. During the period July 24, 1949 to April 10, 1950, he performed CAF-9 duties as the result of a procedurally defective demotion in reduction in force. During the period April 10, 1950 to October 10, 1951, plaintiff performed the duties of a CAF-9 position, to which position he would have been properly demoted in reduction in force even if he had not been improperly so demoted on July 24, 1949. This Court has previously indicated that recovery of back salary should be limited to the period during which the plaintiff suffered a loss of salary as the result of an improper personnel action. In *Brennan* v. *United States*, 123 C. Cls. 326, while dismissing the petition on other grounds, this Court stated as follows, at page 335:

> * * *. Obviously, had plaintiff not been separated by reduction in force on January 9, 1948, he would have been separated by March 31, 1948, in connection with the replacement order of the Civil Service Commission. This would have been only one day longer than plaintiff actually remained on the payroll upon the expiration of his accrued leave. From this it can be seen that plaintiff was not subject to any undue hardship by reason of his earlier reduction in force upon the basis of the retention records as they actually existed at that time. * * *.

In *O'Brien* v. *United States,* 129 C. Cls. 752, this Court expressly limited plaintiff's recovery to the date it was shown that he would have been replaced on the retention register by employees with a higher retention rating. At page 756 of the opinion, the Court stated, as follows:

* * * * *

> Had plaintiff been restored to the position which he held at the time he entered the military service he would not have been entitled to hold the place beyond the date March 15, 1946, when he would have been displaced by veterans' preference employees who held a higher rating than that of the plaintiff.

* * * * *

> The plaintiff is entitled to recover for the period October 19, 1945, to March 15, 1946, * * *.

* * * * *

Plaintiff bases his right to recover, in part, on the Fifth Amendment. However, there is no merit to this

contention. It is settled that employment in a Government position is not "property" within the protection of the Fifth Amendment. *Bailey* v. *Richardson,* 182 F. 2d 46; affirmed, 341 U.S. 918.

Plaintiff also asserts in his brief that the defendant is estopped from claiming that his right to recovery should end April 9, 1950, the date the two employees with higher retention credits than plaintiff were demoted to CAF-9 positions. It is the position of defendant that the facts as stipulated in this case do not permit the application of the doctrine of equitable estoppel. In any event, the law seems to be well settled that the United States is not estopped by acts of their officers and agents in causing to be done what the law does not sanction or permit. *Wilber National Bank* v. *United States,* 294 U.S. 120 (1935). None of the cases cited by plaintiff in support of his contention are applicable. In *Gemsco, Inc.* v. *United States,* 115 C. Cls. 209, this Court held that plaintiff was not precluded from recovery by his failure to appeal a question of law to the contracting officer. No question of estoppel was involved in *Walters* v. *United States,* 130 Fed. Supp. 360, 131 C. Cls. 218. In *Mahoning Investment Co.* v. *United States,* 78 C. Cls. 231, *Dair* v. *United States,* 83 U.S. 1, and *Harvey Radio Laboratory* v. *United States,* 126 C. Cls. 383, cited by plaintiff in his brief, it was the plaintiffs against whom the doctrine of estoppel was invoked, not the defendant United States. The case of *Knight* v. *United States,* 35 C. Cls. 129, also cited in plaintiff's brief is clearly distinguishable on the facts. In the *Knight* case, *supra,* a commissioner employed to examine and classify lands continued to perform services after the date his employment was supposed to terminate. No objection was

raised by the Department of the Interior which continued to receive the reports resulting from that plaintiff's work. The Court held that under the circumstances of the case, the United States was precluded from raising the defense that the employment terminated with the expiration of the fiscal year because a clear injustice would result if it should be held that the defense should be sustained. To the extent that the *Knight* case, *supra,* is cited as authority for the proposition that estoppel can be generally pleaded against the United States, it must be held to be overruled by *Wilber National Bank* v. *United States,* 294 U.S. 120, cited above by defendant.

CONCLUSION

In view of the foregoing, plaintiff is not entitled to recover the claimed difference in salary for any period beyond April 9, 1950, the date he would have been demoted in lieu of separation due to reduction in force. The parties have stipulated that for the period July 24, 1949 to April 10, 1950, the difference in salary between plaintiff's GS-12 (P-5) position and his CAF-9 position is $734.52. In no case would plaintiff be entitled to judgment in excess of this amount.

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CITATIONS

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409148—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 550

BERNARD J. MCKENNA, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 7–9) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1956. Petitioner's motion for rehearing, timely filed, was denied on July 12, 1956. On October 8, 1956, the Chief Justice granted petitioner's motion to extend the time for filing a petition for a writ of certiorari until November 10, 1956. The petition for a writ of certiorari was filed on November 5, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether petitioner, who was erroneously demoted in contravention of his rights under the Veterans Preference Act of 1944, is entitled to recover the difference in salary between the two positions from the time of his erroneous demotion until his proper separation from the service or only until the time he otherwise would have been demoted in consequence of a second reduction in force.

STATUTE INVOLVED

The pertinent provisions of the Veterans' Preference Act of 1944, 58 Stat. 387, as amended, 5 U. S. C. 851, *et seq.*, are set forth in the Appendix, *infra*, p. 6.

STATEMENT

Petitioner, a veteran's preference eligible, brought suit in the Court of Claims to recover the difference in salary between a GS–12 and a GS–9 grade for the period of July 24, 1949 to October 10, 1951, alleging that he had been wrongfully demoted in violation of his rights under the Veterans' Preference Act of 1944 (*infra*, p. 6). The Government admitted that petitioner's demotion was erroneous, but contended that it was liable for the difference in salary only until April 10, 1950, the time when, because of a reduction in force, petitioner otherwise would have been properly demoted. The undisputed facts were established by stipulation and may be summarized as follows:

On July 24, 1949, as a result of a reduction in force in the Veterans Administration, petitioner was de-

moted from a Rating Specialist (Legal) with a rating of GS–12 to a Registration Officer (GS–9) (Pet. App. 7; Stipulation 1). This demotion was improper inasmuch as one McDougall, who had erroneously been listed as a veteran's preference eligible, was retained as a Rating Specialist (Pet. App. 7). Subsequently, this mistake was discovered, McDougall's veteran's preference was withdrawn,[1] and he was furloughed, his last day of duty being April 15, 1950 (Pet. App. 7; Stipulation 1–2).

On April 10, 1950, a further reduction in force became effective. On that date, two employees demoted from GS–12 positions to GS–9 positions held higher retention credits than petitioner would have held had he not been erroneously demoted (Pet. App. 8). Thus if plaintiff had not been erroneously demoted to a GS–9 position on July 24, 1949, he would have been properly demoted to this rating on April 10, 1950.

On October 10, 1951, McKenna was properly separated from the service (Pet. App. 8). McKenna sued for the difference in salary between GS–12 and GS–9 from July 24, 1949, the date of his improper demotion, through October 10, 1951.[2] The Court of Claims held that he was entitled to the difference only from July 24, 1949 until April 10, 1950, the date

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[1] McDougall's status was not finally determined until June 1, 1953, when this Court refused to review a decision holding that McDougall was not entitled to a veteran's preference (Pet. App. 7–8). *McDougall* v. *United States Civil Service Commission*, 202 F. 2d 361 (C. A. D. C.), certiorari denied, 345 U. S. 969.

[2] If this period were used to compute the judgment, damages were stipulated to be $2,790.98 (Pet. App. 8).

on which he properly would have been demoted, and awarded petitioner a judgment for $734.52.[3]

ARGUMENT

This is a suit for loss of salary resulting from an erroneous demotion by which petitioner was deprived of his rights under the Veterans Preference Act of 1944, 58 Stat. 387, as amended, 5 U. S. C. 851, *et seq.* However, the undisputed fact is that petitioner would have been entitled to no higher salary after April 10, 1950, than he was in fact receiving, for on that date Section 12 of the Veterans Preference Act would have required his demotion if he had not already been demoted. He was deprived of no salary after April 10, 1950, for he was not entitled to the higher position after that date. The Court of Claims granted petitioner the difference in salary between July 24, 1949, the date of his demotion, and April 10, 1950. He was entitled to no more.

It is difficult to understand from the petition or the lower court briefs on what basis petitioner controverts this obvious conclusion—a conclusion, we note, which is in full accord with the Court of Claims' earlier decisions in *Brennan* v. *United States,* 123 C. Cls. 326, certiorari denied, 344 U. S. 935, and *O'Brien* v. *United States,* 129 C. Cls. 752. No question is presented which merits review by this Court.

[3] The amount stipulated as damages if computed in reference to this period (Pet. App. 8).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1956.

APPENDIX

Veterans' Preference Act of 1944, 58 Stat. 387, as amended by the Act of August 4, 1947, 61 Stat. 723, 5 U. S. C. 851, *et seq.*:

Section 12 (5 U. S. C. 861):

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings * * *.

Section 14 (5 U. S. C. 863):

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or barred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice * * * stating any and all reasons, specifically and in detail, for any such proposed action * * *.

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Supreme Court of the United States

OCTOBER TERM, 1956

NO. 550

BERNARD J. McKENNA, Petitioner,

v.

THE UNITED STATES.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO UNITED STATES COURT OF CLAIMS

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Integration indicates that the decision of this Court on December 17, 1956 should be reconsidered under Rule 58.

The Government, on page 4 of its brief in opposition to the granting of the writ, says of petitioner: ". . . Section 12 of the Veterans Preference Act would have required his demotion. . . ."

Section 12 not only does not require demotion it has nothing to do with demotion or reduction in grade and salary of a veteran employee. It covers only a separation from the rolls, that is a discharge or dismissal, which it terms a "release".

On the same page of its brief, the conclusion of the Court of Claims is said to be "in full accord" with *Bren-*

nan v. United States, 123 C.Cls. 326 and *O'Brien v. United States,* 129 C.Cls. 752. If counsel had examined these cases the truth stands out in them that neither had anything to do with the Veterans Preference Act nor with the issue in this case.

Whether restitution of the salary of petitioner as an individual should be in the amount of $700 or $2,700 is not a special and important reason for this Court. But the writ was not asked for in this sense.

The integrity of the Government demands that it demonstrates to the world that it follows its own laws at home.

In this case you have the executive branch persisting in arguing it can disregard the procedures enacted for its employees, and the forum to which a violated employee is compelled to turn closing its eyes to the statutes and regulations by a ruling without reason or precedent, and by an act of will instead of judgment, saying what it thinks should be done, because by the law of averages its ukase may not be questioned.

When the Government pleaded "the impact of federal employment" from a decision, it got its writ: *Elder v. Brennan,* 341 US 277; as was the case of a "conflict" with a federal appellate decision: *U.S. v. Olympic Radio,* 349 US 232; and how WW I draftees would be affected: *Patterson v. Lamb,* 329 US 539.

The Court of Claims in this case throws out all decisions, affects all employees still in service and impairs their rights. Among the old cases it refused to consider are *U.S. v. Perkins,* 116 US 483 and *U.S. v. Wickersham,* 201 US 390.

When the Court of Claims arbitrarily abandons its function to follow the law by permitting the executive branch of Government to write its own verdict after admitting an illegal act and admitting it did nothing about it, this Court can integrate into what Congress intended the rights of employees, if it will lay down the law of the land.

B. J. McKENNA, *pro se.*